MORGAN GUARANTY TRUST CO. NEW YORK

v.

LIAN SENG PROPERTIES SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[COMPANIES WINDING-UP NO. D1-42-577-1987]
23 JUNE 1989

COMPANY LAW: *Petition for winding-up - Rights of supporting creditors to be substituted as petitioners - Debts owing must be provable in the winding-up per se - Effectiveness of the provision of forbearance to sue - Whether the rights to counterclaim affect the creditors' rights to petition for winding-up.*

CIVIL PROCEDURE: *Extension of time under O. 3 r. 5(3) of Rules of the High Court 1980 - Reckoning of time under O. 3 r. 2(5) of Rules of the High Court 1980.*

The petitioner petitioned for the winding-up of the respondent. The petition was supported by one Pembinaan KSY Sdn. Bhd. (KSY) who claimed to be a creditor of the respondent. When the petition came on for hearing, the petitioner informed the Court that it had assigned its rights in the contract of guarantee to one Corporate Express (M) Sdn. Bhd. and had no further interest in the petition. Corporate Express formally applied to be substituted as petitioner. KSY also applied by an oral application to be substituted as petitioner.

Before these applications for substitution could be considered, the respondent moved the Court to have KSY struck off as a supporting creditor, on the ground that it had no *locus standi* to support the petition. KSY had initially purported to have the right to be a supporting creditor on 2 judgments which they had obtained against the respondent i.e., (a) an O. 14 judgment obtained on 17 November 1988 for RM12,902,001 and (b) a judgment in default of statement of defence entered on 31 March 1987 for RM10,529,000.

However, the respondent contends that the default judgment of 31 March 1987 is invalid because KSY had by their letter dated 20 March 1987 given the respondent an extension of 7 days from 23 March 1987 to file and deliver the defence. In effect the respondent were given until 2 April 1987 to deliver defence and that accordingly there was no question of default of defence as on 31 March 1987. Thus the judgment in default should be set aside. Whether or not it is set aside, it is *ipso facto* invalid and that a right to be a supporting creditor in a winding-up petition cannot be founded on such a judgment.

And also, the judgment obtained in an O. 14 application on 17 November 1988 had not come into existence when the petition was presented on 10 December 1987. According to *The Law of Company Liquidation* by McPherson, "The applicant must however be one to whom the company owes a valid debt which has not been paid at the date of filing of the application for a winding up order ..."

KSY in turn argued that it did not have to rely on either of the 2 judgments as its right to be a creditor crystallised on 15 September 1987 when KSY completed the project agreed upon between both parties or at the latest on 1 November 1987 which was the date of the certificate of practical completion, both of which were prior to the presentation of the petition on 10 December 1987. KSY submitted it was a creditor of respondent as at date of presentation of the petition by virtue of an executed and completed contract in accordance with a lump sum

agreement. However, clause 5(c) of the lump sum agreement provides that the agreed lump sum could be paid within a period of 18 months from date of completion which date of payment would be well after the date of the presentation of the petition. It was contended that because respondent had not made certain payment of interests, KSY was entitled not to wait for the 18 months to expire. Reliance was placed on subclause (b) of clause 3 of the agreement, a provision of forbearance to sue.

There was also an issue as to whether the respondent could make a cross-claim against KSY, and if it could, the effect of it on KSY's right to petition for a winding-up.

Held:

[1] A statement of defence has to be filed within the period prescribed by O. 18 r. 2 of the Rules of the High Court 1980. But there can be an extension of the period under O. 3 r. 5(3). And O. 3 r. 2 deals with the reckoning of time fixed by the rules and O. 3 r. 2(5) is relevant here. In this case, 23 March 1987 was a Monday, accordingly there was a Saturday and Sunday within the 7 days extension granted by KSY, which 2 days, have by virtue of O. 3 r. 2(5) to be excluded from the reckoning which has the result that the 7 days end on 2 April 1987 which in turn means that the defendants had until 2 April 1987 (inclusive of that date) to file the defence and that the defence was in fact filed on that day. Therefore, the respondent cannot have been and were not in default of defence on 31 March 1987. Accordingly, the judgment in default has to be regarded as a nullity. It follows that the respondent has the option either of ignoring it or of going to the Court and asking for it to be set aside. On the basis of that judgment KSY has no *locus standi* in this petition.

[2] Section 291 of the Companies Act provides that the laws applying to bankruptcy will apply in respect of proof of debts in a winding-up of a company. The Master of Rolls in *Re Tollemache* stated that "... when the only evidence of a debt is a judgment and the judgment has been recovered after the act of bankruptcy, the judgment debt cannot be proved in the bankruptcy. Applying that principle the Court held that the amounts ordered to be paid pursuant to the said judgment on 12 November 1988 is not a debt provable in the winding-up *per se*.

[3] Forbearance to sue in clause 3(b) does not have the effect of doing away with or shortening the 18 months period even if there are breaches or even if there has been a presentation of a winding-up petition. If that had been the intention a specific proviso to the effect would have been included in the agreement either attached to clause 5 or elsewhere. The question of forbearance to sue would only arise once the right to sue had been vested. By the terms of the agreement, such vesting was not to take place until the 18 months had passed. The crystallisation that KSY relies on would only come about when the agreed 18 months period was completed which was well after the date of the presentation of the petition.

[4] Citing the law in *L.H.F. Wool Ltd.*, it is agreed that the modern practice was that where a company had a genuine and substantial cross-claim against the petitioning creditor which it had not reasonably been able to litigate, the petition should usually be dismissed or stayed. Here, a cross-claim has been filed and affidavits have been filed to attempt to demonstrate that the cross-claims are genuine. The Court had not found anything to suggest that they are frivolous.

[Respondent's motion granted. KSY struck off as supporting creditor.]

Cases referred to:
Anlaby & Ors. v. Praetorius [1888] 20 QBD 764
Syarikat Joo Seng & Anor. v. Habib Bank Bhd. [1986] 2 MLJ 129
Harkness v. Bells Asbestos & Engineering Ltd. [1967] 2 QB 729
Eu Finance Bhd. v. Lim Yoke Foo [1982] 2 MLJ 37
Ex parte Bonham, In re Tollemache [1885] 14 QBD 605
Re Malay National Banking Corporation Limited [1957] 23 MLJ 33
In re L.H.F. Wool Ltd. [1970] 1 Ch 27
In re Portman Provincial Cinemas Ltd. [1964] 108 Sol
Datuk T.P. Murugasu v. Wong Hung Nung [1988] 1 CLJ (Rep) 30
Re Mittagong RSL Club Ltd. 4 ACLR 897
"The Fedors" [1986] 2 LLL Reports 441

Legislation referred to:
Bankruptcy Act 1967, s. 47
Companies Act 1965, s. 219(2)
Companies (Winding-Up) Rules 1972, r. 33
Rules of the High Court 1980, O. 2 r. 1, O. 3 rr. 2, 5, O.14, O.18 r. 2

For the petitioner - Rosli Dahlan; M/s. Allen & Gledhill
For the respondent - Major M.S. Murthi; M/s. Murthi & Partners
For the supporting creditor - P.S. Gill; M/s. Gill & Tang
For the Corporate Express (M) Sdn. Bhd. - Lorraine Cheah; M/s. Shearn Delamore & Co.
For the Utama Wardley Berhad - Shanthy Thuraisingham; M/s. Kadir, Tan & Ramli
For the Md. Tan Lee Choo & Jagur Sdn. Bhd. - S.M. Choong; M/s. Mah Weng Kwai & Associates

JUDGMENT

VC George J:

(On Encl. 72)

Lian Seng Properties Sdn. Bhd. (Lian Seng), the registered proprietors of certain lands in Jalan Bukit Bintang, Kuala Lumpur had decided to develop it by constructing a multi-storey complex on it to be known as K.L. Plaza. The contractors engaged for the construction was Pembinaan KSY Sdn. Bhd. (KSY). In embarking on this development exercise Lian Seng had made substantial borrowings from various financial institutions including the American International Assurance Company, the repayment of whose loan of RM30 million and interest was guaranteed by Morgan Guaranty Trust Company of New York (Morgan) pursuant to which guarantee Morgan had made a demand on Lian Seng for RM33,323,593.91 which demand not being met, Morgan caused the instant petition to wind up Lian Seng to be presented on 10 December 1987. The petition was supported *inter alia* by KSY who claimed to be a creditor of Lian Seng.

When the petition eventually came on for hearing Morgan informed the Court that it had assigned its rights in the contract of guarantee to one Corporate Express (M) Sdn. Bhd. and had no further interest in the petition. Corporate Express formally applied by Encl. (71) to be substituted as petitioner. KSY also applied by an oral application made by Counsel to be substituted as petitioner.

Before these applications for substitution could be considered Lian Seng moved the Court by Encl. (72) to have KSY struck off as a supporting creditor. It was submitted that it had no *locus standi* to support the petition. Encik P.S. Gill of Counsel for KSY took a preliminary objection in respect of the motion, Encl. (72) submitting that the issue of whether KSY was a creditor was something to be gone into after the substitution had been made.

KSY's entitlement to be substituted in place of the petitioner depends on its right to present a petition. Rule 33 of the Companies (Winding-Up) Rules 1972 provides that the substitute petitioner would have to be a person (which term includes a corporation) who "would have a right to present the petition and who is desirous of proceeding with the petition". KSY's claim to the right is as a creditor entitled to support the petition. If it is not entitled to do so it cannot be substituted as petitioner. Accordingly the challenge to its *locus standi* is an issue that can and has to be disposed of before the decision is made as to who if anybody should be substituted in place of the withdrawing petitioner. The objection was overruled.

KSY had initially purported to found the right to be a supporting creditor on two judgments which they have obtained against Lian Seng. Peter Kuah Tian Nam, the managing director of KSY in para. 1(c) of his affidavit Encl. (68) refers to the two judgments - an O. 14 judgment obtained on 17 November 1988 for RM12,902,000 and a judgment in default of statement of defence entered on 31 March 1987 for RM10,529,000.

En. M.S. Murthi of Counsel for Lian Seng contends that the default judgment of 31 March 1987 is invalid. What had happened was that the solicitors for KSY having served the writ seeking judgment for a liquidated amount of RM10,529,000 said to be the outstanding amounts on architects' certificates and for general damages interest and costs, had by their letter of 20 March 1987 given the defendant an extension of 7 days from 23 March 1989 to file and deliver the defence. What was filed and delivered was a defence and counterclaim and set-off which was filed and delivered on 2 April 1987. In the meantime, on 31 March 1987 the plaintiff's solicitors entered the said default judgment. En. Murthi's contention is that in effect by that letter of 20 March 1987 the defendants were given until 2 April 1987 to deliver the defence and that accordingly there was no question of default of defence as on 31 March 1987 and it follows, he contends, that the judgment ought to be set aside and it is further contended that whether it is set aside or not it is *ipso facto* invalid and that a right to be a supporting creditor in a winding-up petition cannot be founded on such a judgment.

I pause to note that an application to set aside the said default judgment was filed (a copy of which application is exhibited as MSM3 to Encl. (78)) but it was not proceeded with apparently because of an agreement entered into between the parties on 22 April 1987 (Encl. (68) Exhibit PK1) whereby *inter alia* it was apparently agreed that all proceedings between the parties should be stayed.

Now a statement of defence has to be filed within the period prescribed by O. 18 r. 2. But there can be an extension of that period. Order 3 r. 5(3) provides as follows:

> The period within which a person is required by these rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.

And O. 3 r. 2. deals with the reckoning of time fixed by the rules and sub-rule (5) to O. 3 r. 2 provides as follows:

> Where, apart from this paragraph, the period in question, being a period of 7 days or less, would include the day before the weekly holidays, the weekly holiday or public holiday, that day shall be excluded.

En. P.S. Gill submitted that the reckoning of time has to be done on the basis provided by the Interpretation Act. However, as was pointed out by En. Murthi, s. 2(3) of the Interpretation Act does provide that the Act applies only if no other provisions are available. The extension of time given by the plaintiff's solicitors was pursuant to the power to do so

given by O. 3 r. 5(3) and accordingly the specific provision for reckoning of time given in the RHC will apply in preference to the general rules of reckoning given in the Interpretation Act. Accordingly O. 3 r. 2(5) applies.

Now 23 March 1987 was a Monday. Accordingly there was a Saturday and a Sunday within the 7 days' extension granted by the plaintiff's solicitors which two days have by virtue of O. 5 r. 2(5) to be excluded from the reckoning which has the result that the 7 days end on 2 April 1987 which in turn means that the defendants had until 2 April 1987 (inclusive of that date) to file the defence. The defence, as has been seen, was filed on 2 April 1987. Whether it was so filed or not, on 31 March 1987 the defendants cannot have and were not in default of defence. Accordingly the said default judgment entered on 31 March 1987 was irregularly entered independent of the RHC and should be set aside *ex debito justitiae*. I pause to note the terms of O. 2 r. 1(1):

> Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

However O. 2 r. 1 has no relevance where the irregular entry of judgment was made, as was done here, independent of any of the rules - see *Anlaby & Ors. v. Praetorius* [1888] 20 QBD 764 at 769, 770 & 771 followed and applied by the Supreme Court in *Syarikat Joo Seng & Anor. v. Habib Bank Bhd.* [1986] 2 MLJ 129 at 131F. The judgment of 31 March 1987 has to be regarded as a nullity. Where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the Court and asking for it to be set aside - *Harkness v. Bells Asbestos & Engineering Ltd.* [1967] 2 QB 729. Such an order may be attacked in collateral proceedings - per Abdoolcader J speaking for the Federal Court in *Eu Finance Bhd. v. Lim Yoke Foo* [1982] 2 MLJ 37. Accordingly the attack on that default judgment in these collateral proceedings may be entertained even though the judgment has not been set aside. The right to support the petition as a creditor cannot be founded on such a default judgment. On the basis of that judgment KSY has no *locus standi* in this petition and cannot and will not be accepted as a substitute petitioner.

The other judgment relied on by KSY was the one for RM12,902,000 obtained in an O. 14 application on 17 November 1988. As has been seen, the instant petition was presented on 10 December 1987 on which date the said judgment had not come into existence.

The Law of Company Liquidation by McPherson 3rd Edn., says, at p. 41, in dealing with a creditor's application for a winding-up order, "The applicant must however be one to whom the company owes a valid debt which has not been paid at the date of filing of the application for a winding-up order ..." At p. 45 the learned author concludes that a creditor in the context includes every person who has the right to prove in winding-up.

Section 291 of the Companies Act provides that the laws applying to bankruptcy will apply in respect of proof of debts in a winding-up of a company. Section 47 of the Bankruptcy Act provides that the bankruptcy whenever it may be eventually pronounced shall be deemed to have relation back to and commence at the time of the act of bankruptcy being committed on which the receiving order is made. Section 219(2) of the Companies Act is a similar relation back provision in respect of winding up, the winding-up to be deemed (in all cases other than a voluntary winding-up) to have commenced at the time of the presentation of the winding-up.

Applying similar provisions the Master of the Rolls in *ex parte Bonham, In re Tollemache* [1885] 14 QBD 605 said:

> I am prepared to lay this down, that when the only evidence of a debt is a judgment, and the judgment has been recovered after the act of bankruptcy, the judgment debt cannot be proved in the bankruptcy.

This principle was applied by Spenser Wilkinson J in *re Malay National Banking Corporation Limited* [1957] 23 MLJ 33 where after having cited the above passage from the Master of the Roll's judgment the learned Judge went on to hold at p. 34 as follows:

> This decision is, in my opinion, applicable to the law of bankruptcy in force in the Federation. In this case the only evidence before the Official Receiver of the debt in respect of which the proof was lodged was the judgment of the Court in civil suit no. 279 of 1952. This judgment was obtained after the petition to wind up the Malay National Banking Corporation Limited was presented, and if it is material the judgment in default was obtained by Mohamed Store, subsequent to the date of the presentation of the petition with the knowledge of Mohamed Store that a petition had been presented. In these circumstances I am doubtful whether any part of the proof of Mohamed Store in the winding-up should have been allowed.

Applying that somewhat startling principle I have to hold that the amounts ordered to be paid pursuant to the said judgment of 12 November 1988 is not a debt provable in the winding-up *per se* the judgment and that accordingly the basis for seeking recognition as a supporting creditor by KSY relying on the judgment of 17 November 1988 is not a sound basis.

En. P.S. Gill did not directly deal with the principle in *ex parte Bonham, In re Tollemache* but in effect appeared to concede the argument by taking the stand (or in any event taking the alternative stand) that KSY did not have to rely on either of the two judgments as in his submission KSY's right to be a creditor crystallised on 15 September 1987 when KSY completed the K.L. Plaza Complex or at the latest on 1 November 1987 which was the date of the certificate of practical completion, both of which dates were prior to the presentation of the petition on 10 December 1987.

The parties had entered into what is described as the lump sum written agreement, Exhibit PK1 to Peter Kuah's affidavit encl. (68) on 22 April 1987. *Inter alia* it provides that the project i.e., the erection and completion of the K.L. Plaza Complex shall be deemed to be completed upon the consultant architect issuing a certificate of practical completion. Such a certificate was issued on 1 November 1987 certifying that the job had been completed on 15 September 1987.

Encik Gill's submission was that on such completion the parties had agreed that RM26,050,000 with interest would be payable to KSY. It was contended that KSY was entitled to be a supporting creditor in that it was a creditor of Lian Seng as at the date of presentation of the petition by virtue, as En. P.S. Gill put it, of an "executed and completed contract in accordance with the lump sum agreement Exhibit PK1 to Encl. (68)"

However clause 5(c) of the lump sum agreement provides that the agreed lump sum has to be paid within a period of 18 months from date of completion which date for payment would be well after the date of the presentation of the petition. It was contended that because certain monthly payment of interest had not been made and in any event because of the presentation of the petition to wind-up, KSY was entitled not to wait for the 18 months to expire. Reliance was placed on sub-clause (b) of clause 3 which should be looked at:

3. In consideration of the premises contained herein and the due performance of the company of all its obligations the contractor hereby undertakes as follows:

(a) to complete the said project in accordance with the contract within a period of four (4) months from date of receipt of the first RM1 million from the bridging financiers;

(b) to suspend all legal action against the company from date hereof until "the due date" mentioned in para. 5(c) below provided that if the company should breach any part of this agreement or applications are made by any persons or corporations for the winding-up of the company or the appointment of receivers, the contractor shall be relieved of its forbearance to sue and the contractor shall be at liberty to take such legal action as the contractor deems fit.

The actual terms of the said clause 5(c) are as follows:

5(c) the company further undertakes to pay the lump sum amount referred to in para. 5(a) above, within a period of eighteen (18) months from the date of completion of the said project (hereinafter referred to as the due date) or upon the occurrence of any sale as in para. 5(d) contained herein whichever shall be the earlier.

In my judgment the forbearance to sue in clause 3(b) does not have the effect of doing away with or shortening the 18 months period even if there are breaches or even if there has been a presentation of a winding-up petition. If that had been the intention a specific proviso to that effect would have been included in the agreement either attached to clause 5 or elsewhere. What the parties had agreed in this context was that (i) RM26,050,000 was payable and (ii) it was payable within 18 months. The question of forbearance to sue would only arise once the right to sue had been vested. By the terms of the agreement such vesting was not to take place until the 18 months had passed. The crystallisation that KSY relies on would only come about when the agreed 18 months period was completed which was well after the date of the presentation of the petition. Such forbearance to sue that there was, is in respect of the right to sue that had crystallised or had vested prior to the parties entering into the lump sum agreement.

Another question was the issue of whether it was open to Lian Seng to make a cross-claim against KSY and if it was, the effect of it on KSY's right to petition for a winding-up order. En. Murthi concedes that by the terms of clause 8 of the agreement of 22 April 1987 Lian Seng is precluded from setting up as a defence any set off or counterclaim. However, he argues that that does not preclude Lian Seng from filing a cross-claim which while it would not provide a defence to KSY's action is relevant on the issue of KSY's entitlement to wind-up Lian Seng.

As has been seen, the provisions in respect of bankruptcies apply in respect of proof of debt and s. 41 of the Bankruptcy Act provides that where there are mutual credits, mutual debts or mutual dealings between the debtor and the person proving, an account shall be taken of what is due from the one party to the other and there would be a setting off and what can be proved as a debt will be the balance, if any, after such setting off.

For Lian Seng it is said that they are entitled to a cross claim for defective works even though the defects liability period had passed. The authoritative text book *Hudson's Building & Engineering Contracts* 10th Edn., provides at p. 396 the following view:

In the eighth and ninth editions of this book it was submitted that, where the contract does not provide to the contrary, although the building owner cannot insist upon the contractor making good defects which may appear after the period expires, there is nothing to prevent

> him bringing an action for damages in respect of defects which arise from breaches of contract by the contractor, and this view has now received the support of modern authority. It is always a question of construction whether the rights under the maintenance clause are intended to supplant the right to damages at common law altogether. In the absence of express provisions the remedies under these clauses are in addition to and not in substitution for the common law rights, and even where the defects have appeared within the period the employer may sue for damages rather than call on the contractor to do the work, subject, in that event, to the employer's damages being limited, for the reasons stated *supra*, to the cost the contractor of doing the work at that time, rather than the possibly greater cost of bringing in another contractor either then or at a later date.

In re L.H.F. Wool Ltd. [1970] 1 Ch. 27 the English Court of Appeal pointed out that the modern practice was that where a company had a genuine and substantial cross-claim against the petitioning creditor which it had not reasonably been able to litigate, the petition should usually be dismissed or stayed. The Court of Appeal had followed the opinion expressed *in re Portman Provincial Cinemas Ltd.* [1964] 108 SOL J 581 where Lord Denning stated the law thus:

> As I understand the law on the matter, it is this: if there is a genuine cross-claim with substance in it, then let it be tried out in the Queen's Bench Division: this petition must be rejected. But if there is no substance in the cross-claim, then let the Court do justice to the petitioners in this case and not give heed to so insubstantial a cross-claim.

It was pointed out that by clause 7 of the lump sum agreement the parties had agreed that each of them waive antecedent breaches. But against that is the strong argument that you can only waive what is known - see *Datuk T.P. Murugasu v. Wong Hung Nung* [1988] 1 CLJ (Rep) 30.

En. Gill refers to *re Mittagong RSL Club Ltd.* 4 ACLR 897 which reiterates that a substantial claim in the nature of a cross-claim or set off would be sufficient to defeat a petitioner's right to a winding-up order but which emphasises that it should be a genuine cross-claim.

A cross-claim has been filed. Affidavits have been filed to attempt to demonstrate that the cross-claims are genuine. I have not found anything to suggest that they are frivolous. I cannot on such information that is before me brush aside the cross-claim as being not genuine or insubstantial.

It is not for this Court at this stage to try the cross-claim. Following the *dicta* of Lord Denning MR, Lian Seng's cross-claim has to be tried in the Court where it has been filed at the appropriate time. Until then KSY will have to wait before it can petition to wind up Lian Seng.

En. Gill referred me to *"The Fedora"* [1986] 2 LL.L. Reports 441. There were cross-claims there. Evans J in the Court below held that the cross-claims:

> asserted by the defendants were arguable and that the defendants could proceed with them by way of counter-claim; by reason of the provisions of the loan agreements and the guarantees the claims were not available by way of set off or as a ground for giving unconditional leave to defend; the bank were entitled to summary judgment but the defendants would be granted stay of execution.
>
> The defendants appealed contending that the learned Judge had erred and that they should be given unconditional leave to defend. The plaintiff bank cross-appealed contending that the stays of execution should be removed.

The Court of Appeal allowed the appeal stating that this Court ought not to interfere since the parties, as the headnote puts it:

> had specifically provided both in the loan agreements and the guarantees that payment should be made free of any set-off or counterclaim; it would defeat the whole purpose of the transaction, would be out of touch with business realities and would keep the bank waiting for a payment which both the borrowers and the guarantors intended it should have while protracted proceedings in the alleged counterclaims were litigated; although the Court had a discretion to grant a stay, such discretion should rarely if ever be exercised; there was no ground for granting a stay and the bank's appeal would be allowed.

It is to be noted that a stay of execution could be granted but which discretion is rarely if ever exercised.

However, in the instant case we are not dealing with a stay of execution but considering whether a creditor against whom the debtor claims to have a genuine substantial cross-claim should be allowed to petition the Court to wind-up the debtor before the cross-claim has been determined. Following *in re LHF Wools Ltd.* (*supra*) and *in re Portman Provincial Cinemas Ltd.* (*supra*) if the cross-claim is substantial and genuine on the face of it the petition would either be dismissed or stayed (pending disposal of the cross-claim).

Accordingly as the two judgments on which KSY initially founded its right to be a supporting creditor have turned out to be not a sound basis and as the right to the agreed lump sum had not crystallised prior to the date of presentation of the petition herein and in any event as the debtor has a substantial cross-claim against KSY in my judgment KSY cannot be recognised in this petition as a supporting creditor. There will be an order in terms of the motion Encl. (72).

Also found at [1990] 1 CLJ 119